IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

W. LEE CLEMENTS AND J. L. BRITT ..... *Petitioners,*

v. No. 276

R. W. BRONAUGH, GEORGE BLACKBURN AND E. T. HORNOR (COMMISSIONERS OF WHITE RIVER DRAINAGE DISTRICT OF PHILLIPS AND DESHA COUNTIES, ARKANSAS) AND WHITE RIVER DRAINAGE DISTRICT OF PHILLIPS AND DESHA COUNTIES, ARKANSAS ..... *Respondents.*

REPLY BRIEF ON PETITION FOR A WRIT OF *CERTIORARI*

The relief sought by Petitioners in this action, and their desire in respect to the completion of the improvement for the construction of which the Respondent District was established, is that the Respondents either build the improvement or cease taxing against benefits which were calculated in the year 1922 (R. Vol. I, 44) for the sole purpose of enabling them to build it. A more reasonable desire can hardly be conceived. Their action was begun in the Circuit Court, the court of law of Arkansas, as the opinion of the State Supreme Court in the previous Chancery proceeding directed that it should be (R. Vol. II, 1-8), and their cause involves and was predicated upon facts involving new conditions which did not exist at the time of the previous action. The new tax order and the new, inadequate construction program, which will burden them, without benefiting them, probably for the rest of their lives, did not exist at the time of the earlier case. In addition, Petitioners demand that the Federal levee, a common or general im-

provement be removed from the basis of taxation, there being no further use for the portion of the assessment of benefits calculated for construction of the levee as a local improvement by the District.

Now that relief has been denied both in equity (in the previous action) and at law (in the present action), the Petitioners must, unless this Court comes to their aid, stand by and see their lands become a part of the domain of the District, which is already, in fact, using them as a reservoir. Thereafter it will be of small moment to the Petitioners here whether the complete improvement, without which their lands will never be productive, are ever built in their lifetime, or are built at any time; for, with their lands lost, their interest ceases, together with their very right to insist that the Respondents perform their duties in a manner consistent with the Constitution of the United States. Further, if the affairs of the District continue under the present program, the Respondents will have no occasion ever to build the complete improvement, for they will have acquired the convenient substitute, at the expense of Petitioners, of large areas of low lands for the benefit of the higher areas. It is submitted that a plainer case of actual confiscation cannot be imagined. In addition, unless review is granted, there will have been established a new principle of taxation whereby taxes for special local purposes may be freely exacted against benefits from general, common improvements constructed by the United States with general funds as a part of the tremendously expanded program for national flood control.

If the State Court judgment is permitted to stand, these things will have been accomplished not after a hearing and determination on the merits of the contentions, but in the name of procedural phrases mis-applied. Consideration of the questions was refused by the state court in the first action on the ground that the court of equity had no jurisdiction to determine them, and, anomalously, in the second action on the ground that the questions had been previously determined. The conclusions operate not only to accomplish the things above stated, but they also, in a singularly effective manner, make the jurisdiction of this Court de-

pendent upon whatever descriptive labels a state Court elects to inject into its decisions.

Respondents, in their Brief, would have this Court glance at the descriptive label, *res judicata,* and automatically decline to proceed, without analysis and without appreciation of the inappropriateness of the term to the case. The arguments advanced by Respondents are actually based upon assumptions founded only upon themselves. It is asserted, for example, in the first and fifth arguments, at Pages 7 and 15 of Respondents' Brief, that *res judicata* precludes further consideration of the case. Statements of principle, removed from their contexts, are then quoted from decisions of this Court. No one would argue against the quoted principles as abstract statements of law. The situation here is that those admittedly sound principles have no application to this particular case.

In the second argument, on page 12 of Respondents' Brief, assertions are made which have no discernible relation to the matters here presented. The Respondents project themselves backward, in time, to the year 1922, when the assessment of benefits, foundation for all subsequent taxation, was tabulated. Respondents seek to forestall corrective action by arguing the propriety of the assessment when it originally was issued some thirty years ago. Petitioners are concerned not with its original validity, but with the fact that the original judgment establishing the District and assessing benefits for *prospective* operation was never carried out and will not be performed in the foreseeable future.

Respondents ignore the fundamental fact that the assessment by its nature merely laid the foundation for action in the future, the required action having never been undertaken and the fundamental purpose of the assessment having never been fulfilled.

The third argument in Respondents' Brief, at page 13, is apparently a digression, the purpose of which is not clear. At first, it is suggested that Petitioners could appeal from the tax levy order rendered on September 2, 1949; yet, in the next breath, it is suggested that notice of the order need not have been (as, in fact, it was not) given to the

Petitioners. (R. Vol. I, 20). The new order (and inadequate construction program for which it was obtained) is incorporated into this proceeding, and Petitioners' claims respecting the present conditions under which the District is operating were necessarily passed upon in the decision of the state court. As noted in the Petition for Writ of *Certiorari*, this action was instituted not only at the very invitation of the state court in its previous opinion in the Chancery suit (R. Vol. II, 1-8) but under the express provisions of the statutes of Arkansas authorizing reassessment of benefits as often as once a year; and the alternative relief was sought under provisions authorizing Petitioners to enforce by *mandamus* the performance of the duty to complete the improvement. (Appendix A. to Petition, Pages 23 and 24, Sections 21-517, 21-519, 21-550, of Vol. II, Ark. Stats. 1947 Annotated; and Act 216 of 1947 of the General Assembly of Arkansas, page 478 of the Acts of Arkansas for 1947).

In the fourth section of Respondents' Brief, at page 14, it is suggested that methods and details of construction are state affairs. Petitioners desire nothing less than to have this Court or the state court enter into the business of construction. The objections are addressed not to the manner and details of construction or to the benefit derivable from the improvement planned in 1919, had it been completed, but rather to the fact that although taxation against improvement benefits continues there is no reasonable prospect of its completion at any foreseeable time, and that although taxation against levee construction benefits will be exacted for the next fifteen years, there remains no occasion for levee construction, the Federal Government having erected a substitute levee as a general flood control project, obviating further use by the District of the large portion of the assessment established in 1922 for the purpose of financing the construction of the then planned local levee. The decisions cited by Respondents are concerned altogether with different factual problems and, it is submitted, have no application to the present case.

By denying the Petitioners any real hearing in the present proceeding, the Supreme Court of Arkansas has

effectively passed upon the Federal claims discussed in the Petition for a Writ of *Certiorari,* of which the state court is not the final judge. The previous Chancery decision (R. Vol. II, 1-8) took away the right to present such claims and objections in equity as to the conditions then existing, and in lieu of that right gave, as an adequate remedy at law, the right to petition for reassessment in the law court. The decision in the present case, review of which is now sought, (R. Vol. II, 11-17), took away the right to proceed at law, after Petitioners had been deprived of their right to be heard on the merits in equity under the express direction that the law court was the forum in which relief should be obtained. The elimination of all remedies and the effective denial of all rights, both under conditions existing at the time of first action and changed conditions at the time of the second, was thus accomplished, without consideration of the merits of the claims in either forum. It is immaterial for purposes of the Petition for Writ of *Certiorari* that the result was accomplished by judicial decree rather than by other instrumentalities of the State. This court has forbidden such a result whatever the method by which the attempt has been made to accomplish it. *Brinkerhoff-Faris Trust & Savings Co.* v. *Walter O. Hill,* 281 U. S. 673. In similar manner, the Circuit Court of Appeals for the Fourth Circuit condemned such a violation of elementary principles of reason and justice in *Duke Power Company* v. *South Carolina Tax Commission,* 81 F. 2d 513, where different mechanics were employed.

In conclusion, it may be noted that a petition to this Court for Writ of *Certiorari* to review the previous Chancery decision would have been groundless; for, assuredly it would have been of no concern to this Court that the State of Arkansas might require that such actions be brought in the law courts of the state rather than in its separate courts of equity. Now, however, by virtue of the decision in the second action, the only other state forum available to Petitioners has denied its facilities to them. The state has thus effectively denied all relief in connection with claims based upon rights guaranteed by the Fourteenth Amendment to the Constitution of the United States. By denial of all relief in all forums, the Federal questions have

now been definitely and necessarily decided, and review is now appropriately sought.

WHEREFORE, it is prayed that the Petition for a Writ of *Certiorari* be granted.

Respectfully submitted,

J. W. House,

Counsel for Petitioners,

1014 Boyle Building,

Little Rock, Arkansas.

October 23, 1951.